No. 120.

Brief of Comstock for Appts.

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JAMES H. McKEEN

Supreme Court of the United States.

Filed Nov. 1, 1897.

FREDERICK W. FINK and ALBERT PLAUT,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANTS.

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C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

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Brief for Appellants.

We desire to discuss this case upon two points; first, the questions submitted in the certificate, and second, the judicial decisions in other cases, which caused the certificate to be made.

I.

As to the questions submitted.

Although two-fold in form, these are substantially but one, viz: is muriate of cocaine more properly dutiable under paragraph 74 of the tariff act of Oct. 1, 1890, or under paragraph 76 thereof? The appellants' contention is that paragraph 74 provides the proper classification, according to thoroughly established principles for the interpretation of statutes, and according to numerous decisions of this court. Either paragraph, 74 or 76,

if viewed by itself, takes some hold of muriate of cocaine ; paragraph 76 by reason of its chemical status or derivation, it being in fact a salt ; and paragraph 74 by its intrinsic character, since it is a preparation and not a natural product ; its method of production, since alcohol is used in its preparation ; and its sole object of existence, since it is a medicine. The question is, therefore, which paragraph has the better, broader and more exact hold of the merchandise,—which being determined, the other paragraph must relinquish its hold. Neither is in its terms exclusive, but each is qualified by the words " not specially provided for ", meaning, not elsewhere in the same act.

Paragraph 74 is more definite than Paragraph 76.

It describes with incomparably greater precision the group of articles within its scope. " Salts " or " chemical salts ", is the vaguest of terms. It suggests no definite association of articles. This is manifest from the ordinary definitions of the word " salt " which follow :

Webster—" A combination of an acid with a base, forming a compound which has properties differing from those of either component."

Worcester—" A term applied to a very large class of compounds, having no characteristic property common to them all, consisting each of two components, simple or compound, and possessing properties materially different from those of either of its components ".

Century—" Any acid in which one or more atoms of hydrogen have been replaced with metallic atoms or basic radicals ; any base in which the hydrogen atoms have been more less replaced by non-metallic atoms or acid radicals ; also the product of direct union of a metallic oxid and an anhydrid ".

The notes *in extenso* which follows these definitions merely serve to render more complete the obscurity which they produce. Thus there is no common characteristic of salts. They are either natural products in the mineral, vegetable or animal world, or the results of elaborate manufacture. They are derived from every department of matter. They are a mere way-station upon the road by which materials travel, in their transformation into articles of consumption, of apparel or of ornament. They enter into every field of employment, dyeing, medicine, manure, poison, perfumery, food, ornament. The term gives no idea of ultimate derivation, character, value, employment or physical characteristics. An enumeration more formless, vague and unsatisfactory is not to be found in the tariff laws.

"Medicinal preparations" is a very different sort of a term. It bristles with characteristics. Observe its definition as given in the certificate: "The commercial meaning of the term medicinal preparations is the same as its ordinary meaning, viz: a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease". Thus are presented at once the attributes of special preparation and of special use. Of these the use is unquestionably the controlling one. Not only is this a beneficent use, peculiarly certain to identify as members of a special class those products which subserve it, but it is a well established doctrine, frequently asserted by this court, that a provision in the tariff laws for any article according to its use takes precedence over a provision for it by trade designation or other characteristics.

Arthur vs Jacoby, 103 U. S.—13 Otto—677.
Robertson vs Salomon, 130 U. S. 412.
Magone vs Heller, 150 U. S. 170.

Since the term "medicinal preparations" is thus more definite than the term "chemical salts", the superiority of paragraph 74 as providing for a product like muriate of cocaine, is still clearer when we observe

that the tariff law has divided medicinal preparations for purposes of classification into two groups, alcoholic and non-alcoholic, the former finding a place in paragraph 74 and the latter in paragraph 75, and that paragraph 74 is further divided into two still more specialized groups, viz: those medicinal preparations of which when imported the alcohol is a component part, and those in whose preparation alcohol is used but which *(semble)* do not when imported contain it. Hence we are no longer concerned with the comparison between a mere provision for "medicinal preparations" and one for chemical salts, but with that between an extremely specialized sub-class of alcoholic medicinal preparations, involving the employment of alcohol in their production, but not containing any, and one for chemical salts. As to definiteness, it seems to us that there can be no question but that the former is incomparably superior.

Repeated decisions of this court establish the doctrine that when a definite and an indefinite provision both cover the same product, the latter must yield to the former.

Isaacs vs. Jonas, 148 U. S. 648.
Bogle vs. Magone, 152 U. S. 623.

Paragraph 74 is more specific than paragraph 76, in the sense of being far narrower.

The certificate recites that "the number of chemical salts is excessively large", but states that there was no adequate testimony as to the relative number of these and of medicinal preparations in the preparation of which alcohol is used. Standard works of reference cannot well be introduced as testimony, but we believe that courts recognize the propriety of resort to them by counsel in argument, or by the judges themselves for the advisement of their minds. We know of no authoritative index or enumeration of chemical salts,

but their number, and that of alcoholic medicinal preparations also, may readily be approximated as follows: It is common knowledge that a salt is produced by the union of an acid and a base, and that as a rule every acid will combine with every base. There are exceptions, but they are more than equalized by the fact that a polyvalent base will form several different salts in combination with differing atomic proportions of the same acid, the like being true of polybasic acids. The most recent standard reference works on chemistry, Dammer's Inorganic Chemistry* and Beilstein's Organic Chemistry§, enumerate about 1200 bases and about 3800 acids. A mere multiplication hence demonstrates that there are approximately 4,500,000 chemical salts. For medicinal substances the most authoritative reference is the United States Dispensatory, wherein both crude or natural and highly prepared products are catalogued. The latest edition of that work mentions about 21,000 such substances. Of these, very many are not preparations, but natural products, and of the preparations, a great proportion —probably a great majority—are prepared without the use of alcohol. Thus we find that the relevant part of paragraph 74 describes a class numbering far less than 20,000 articles, while the relevant part of paragraph 76 describes a class with over 4,000,000 members. A mere disproportion in the number of members covered by either of two provisions of the law might not in itself be a controlling factor in determining their order of precedence, but a disproportion so vast as is here shown, surely creates a conclusive preference in favor of the narrower provision.

Solomon vs. Arthur, 102 U. S. 208.
Hartranft vs. Meyer, 135 U. S. 237.
Seeberger vs. Cahn, 137 U. S. 95.

* Dr. O. Dammer. *Handbuch der anorganischen Chemie*,—1894. 3 vols.

§ Beilstein. *Organischen Chemie*. 4 volumes, now in publication.

Paragraph 74 is couched in language of commercial designation, while paragraph 76 is not.

As set forth in the certificate, the product named "is a medicinal preparation and is known as such by the physician, the chemist, the druggist and in commerce, and was so known definitely, generally and uniformly at and prior to the enactment of the tariff law of 1890." From

U. S. vs. 200 Chests of Tea, 9 Wheat. 430

to

De Jonge vs Magone 159 U. S. 562,

this court has in innumerable cases asserted and reasserted the controlling force of the rule as to commercial designations. As stated by Mr. Justice BRADLEY in

Robertson vs Salomon, 130 U. S. 412,

"it is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws".

Muriate of cocaine is shown to be in the fullest extent within this rule, the language of the certificate bringing it precisely within the latest qualifying decisions of this court, such as Berbecker vs. Robertson, 152 U. S. 373.

With chemical salts the case is entirely different. That, says the certificate "is a generic term, and includes a commercial class of articles known * * * as covering among others muriate of cocaine". It is no compliance with the rule as to commercial designation, to show that a given article is a member of a commercial class not designated for duty in the tariff, but which is *included* within a generic term found in the tariff. Trade designations, specific or general, employed in the law, and shown by testimony to be coincidently employed in trade, are what have been the subject of the many decisions upon this point. Thus upon the certificate, the designation, "medicinal preparations", which is a trade term covering and in-

cluding muriate of cocaine, must be weighed against the generic term "chemical salts", which in fact also includes and covers the said body, but which is not the designation employed by traders either for that body or for any group of which it is a member. Indeed it would be a strange phenomenon if a term which equally well describes over 4,000,000 products should have been found sufficiently definite and descriptive to be employed among merchants for any of their purposes of subdivision.

The course of legislation.

A study of the successive tariff laws relative to chemical compounds and salts and to medicinal preparations, serves to enforce the conclusions so clearly derivable from the act of 1890 viewed alone. Neither the medicinal group nor the chemical group is a new subject of tariff reference. Without delving too far into the past, it may be stated that the Revised Statutes and all later tariff enactments have contained provisions for each of these groups. But the provisions prior to 1890 had been, as to medicinal preparations, less specific and orderly than in that law. In the Revised Statutes, Section 2504, there was one provision (p. 478) for all medicinal preparations other than proprietary ones, and another (p. 480) for all proprietary medicines, while salts and preparations of salts were elsewhere enumerated in the act (p. 481). In the act of 1883 (22 Stat. at L. 494–95), the medicinal preparations were divided into alcoholic, non-alcoholic and proprietary, but were enumerated in three separate and not consecutive paragraphs. The provision for chemical compounds and salts stood substantially as in the act of 1890. In the last mentioned act, with which we are concerned in the present case, these old provisions as to medicines have been brought together in two consecutive paragraphs, the distinction between

proprietary and non-proprietary ones has been done away with (a natural consequence of the abolition of internal revenue tax on proprietary medicines), some adjustment of rates has been made, and the following new language added to the provision for medicinal preparations of which alcohol is a component part, viz: "or in the preparation of which alcohol is used". The provision as to chemical compounds and salts remains substantially unchanged, although the words "by whatever name known", found in the act of 1883, have been stricken out. Thus the only new ground taken by this statute is the one so precisely occupied by muriate of cocaine, viz: the alternative provision for preparations prepared with the aid of alcohol as distinguished from those which, as completed, still contain alcohol. There would seem to be not the least room for doubt, under this law, that the use of alcohol in preparing any medicinal preparation, appropriated the resultant product to paragraph 74, of which this new legislation is a part. It would appear that Congress had acted upon a deliberate intention to reach out and take hold of products like muriate of cocaine, for every medicinal preparation which as imported contained alcohol, was amply provided for without the new language referred to. A substantial change in the law will not be presumed to have been made without intending a substantial change in the operation of the law.

Liebenroth vs. Robertson, 144 U. S. 35.
Grace vs. Collector, 79 Fed. Rep. 315 (C. C. A.)

Even the words "in the preparation of which" seem to have been carefully chosen to apply to muriate of cocaine and like products, for it is precisely in their "preparation" rather than in their production or manufacture, that the alcohol is used, the certificate reciting that "it is necessarily used as a solvent", and its purpose being to refine and purify the product

in order to fit it for the necessary precision of medicinal use. On the other hand, to sustain the contention that paragraph 76 takes precedence of paragraph 74 as to products like muriate of cocaine, would not improbably deprive the new provision in the act of 1890 of all operation, leaving it absolutely null and void. Probably no medicinal preparation exists, in whose preparation alcohol is used, which is not a chemical compound or salt. Unquestionably they are usually if not invariably such. It seems to us repugnant, not only to the established doctrines of interpretation, but to the most ordinary principles of common sense, to adopt a construction which would wholly or largely nullify a carefully drawn new provision of law, enacted in 1890, in favor of a paragraph simply re-enacted from the law of 1883, and far less careful and specific in its language and scope.

Contemporaneous construction.

The construction of former laws, and even the law of 1890, by executive officials, was long and unchangingly in accordance with the foregoing contention.

Medicinal preparations both proprietary and non-proprietary, both alcoholic and non-alcoholic, had always prior to 1890 been assessed under the several provisions for such preparations to which we have referred, and upon protests contending that they should be charged with duty either as salts, or acids, or chemical compounds, or preparations of salts, or even under provisions which designated their precise substance, the Treasury and the courts had repeatedly sustained the classifications thus made.

In Ferguson vs. Arthur, 117 U. S. 482, this court ruled that Henry's calcined magnesia, which consisted of carbonate of magnesia specially prepared and put

up for medicinal use, was properly dutiable as a proprietary medicinal preparation, notwithstanding that there was an express provision in the act for carbonate of magnesia.

The decisions by the Treasury department are so numerous that we quote only a few of the clearest in this place, and have enumerated them serially in appendix A at the end of our brief. We refer to none prior to 1874, not because there were none,—they are continuous from an indefinitely early period,—but because we have not deemed it necessary to quote from the laws prior to the Revised Statutes.

In S. 2867 (June 19, 1876), malt extract, put up and offered as having curative properties, was held dutiable as a medicinal preparation and not as beer, although malt extract not offered as a curative had in a previous decision been held to be beer. Beer was denominatively provided for in the act.

In S. 3080 (Jan. 18, 1877), cigarettes having medicinal characteristics were held dutiable as medicinal preparations, despite the specific provision for "cigarettes of all kinds" in the law (R. S. p. 469).

In S. 3395 (Oct. 28, 1877), salicylate of sodium, a chemical compound and prepared chemical salt, was held dutiable as a medicinal preparation because "used particularly as a medicine", and to be thereby excluded from the provision for "preparations of salts" in that act.

In S. 4011 (May 15, 1879), and S. 4117 (July 29, 1879), the same doctrine was applied to sulphate of cinchonidia and to bicarbonate of potash, both well known chemical compounds and salts.

These decisions construed the provisions of the Revised Statutes, but the same view of the law continued under the act of 1883, whose provisions, both for medicinal preparations and for chemical compounds and salts, were the same as those of 1890, with the important exception of the new provision in the

latter act, covering with the alcoholic medicinals those in whose preparation alcohol was used.

In S. 8504 (Oct. 27, 1887), citrate of iron and quinine, which as its name shows was a chemical salt, was held dutiable as a medicinal preparation, and not under the provision for chemical compounds or salts by whatever name known, in the law of 1883.

Not only under these previous acts, but as stated, under the act of 1890 itself, the same attitude was maintained by the Treasury department and by the board of United States general appraisers, created by the act of June 10, 1890 (26 Stat. at L. 131) to consider and determine issues of this character.

In S. 11194 (May, 1891), acetanilid, a salt produced by combining aniline oil and acetic acid, was upon protest held dutiable as a medicinal preparation non-alcoholic, and not as a chemical compound or salt.

In S. 11572 (July 13, 1891), atropine sulphate, an alkoloidal medicinal salt, containing no alcohol but in whose preparation alcohol was necessarily used as a solvent, was held dutiable by the general appraisers at 50 cents per pound under paragraph 74. The Treasury acquiesced in this decision, which sustained the importer's protest.

In S. 14805 (Feb. 19, 1894), "Brown's Chlorodyne," a proprietary, alcoholic, medicinal preparation, was held dutiable under paragraph 74. In this case, as the language of the decision shows, the appraiser had made a double return, reporting the article to the collector both as a medicinal alcoholic preparation and as a chemical compound, and the collector had chosen the latter as the description to follow in liquidating the duty. The general appraisers disposed of the question by stating—"the Board has invariably held, and is still of the opinion, that enumeration under paragraph 74 is more specific than under paragraph 76."

Thus until 1894, and within a few months of the passage of the new tariff act, which took effect on

August 28th of that year, the construction put upon these paragraphs had been absolutely steady and uniform, by both judges and executive officials, for at least twenty years.

A uniform and long continued interpretation of a course of statutes by those charged with their enforcement, is of almost conclusive weight in resolving any uncertainty as to the proper interpretation.

Robertson vs. Downing, 127 U. S., 607.
Merritt vs. Cameron, 137 U. S., 542.
Heath vs. Wallace, 138 U. S., 573.
U. S. vs. Ducas, 78 Fed. Rep., 339.

And where Congress re-enacts, in language substantially similar, a provision of earlier laws *in pari materia*, the meaning of the new law must be considered to be the same as that which had been put upon the old in practice.

Hedden vs. Robertson, 151 U. S., 520.

It is true that the act of 1890 departed in the particular we have pointed out, from the language of earlier acts. But since the change unquestionably strengthened paragraph 74 in its application to muriate of cocaine, it could not detract from the weight of the rules to which we refer.

To sum up on the question sent here for instructions by the Circuit Court of Appeals:

Paragraphs 74 and 76 both questionably *include* muriate of cocaine.

Paragraph 76 includes it with 4,500,000 other bodies, and specifies no characteristic of it or any of them, while paragraph 74 includes it much less than 20,000 others, and specifies many and vital characteristics common to them all, viz., intrinsic character, means of production and use.

The words used in Paragraph 76 are generic, while the words used in paragraph 74 are an apt commercial designation of a class of articles of which muriate of cocaine is a member.

Paragraph 76 is old law re-enacted without substantial change, while paragraph 74, in its relevant portion, is a provision newly added to the law, and added apparently for the sole purpose of settling the status of such products as muriate of cocaine.

Executive and judicial construction had relegated medicinal salts, under the former laws *in pari materia*, to the much less definitely worded provisions in those laws for medicinal preparations, and had excluded them from provisions substantially similarly worded in such former laws for chemical salts.

II

The judicial decisions in other cases under the act of 1890, as to medicinal preparations, chemical compounds, salts, etc.

Why the judges of the circuit court of appeals have sent a certificate to this court upon the questions herein involved, it is neither the duty nor the prerogative of counsel to explain. But in the absence of any facts or conditions save those set forth in the certificate itself, and discussed in the first part of this brief, we conceive that this court might well be surprised, not alone at the submission to it of questions so easily answered, but with the attitude of the collector of customs in exacting duty at the rate complained of in this case, and of the general appraisers and the circuit court in sustaining such exaction. So far as expla-

nation exists, we think it must be looked for in the several decisions wherein different federal courts have discussed and applied the provisions of the law of 1890. These cases are the following :

Appeal of Battle & Co., 50 Fed Rep. 492.
The same (Circuit Court of Appeals), 12 U. S. Appeals 11.
In re Hirzel, 53 Fed. Rep. 1006.
The same (Circuit Court of Appeals), 20 U. S. Appeals 170.
In re Mallinckrodt Chemical Works, 66 Fed. Rep. 746.

Examination will show that none of these but the last conflicts in the slightest degree with the construction for which we contend, and that the last, a decision by the U. S. circuit court in the eighth circuit, is the one which, practically, we are here to reverse. But these decisions (except the last) have been misunderstood and misapplied by the Treasury officials, including the board of appraisers, and while we do not think that the circuit court in New York which decided the present case misunderstood them, Judge COXE stated that he felt constrained, as a matter of interjudicial comity, to follow the decision in the Mallinckrodt case, since it had been rendered by a court of coördinate jurisdiction. To briefly analyze the cases above cited :

The case of Battle & Co. raised the question of duty on chloral hydrate, which had been assessed at 50 cents per pound under paragraph 74, the importer appealing from such exaction, and claiming the right to enter at 25 per cent. *ad valorem*. The opinion in the circuit court, which was affirmed in very few words on appeal, sustained the contention of the importer, mainly upon the ground that as the evidence proved, there were several processes equally available in producing chloral hydrate, of which only one involved any employment of alcohol. The completed product con-

tained no alcohol, and gave no indication whether or not it had been made by the alcohol process. The court very justly ruled that duty at 50 cents per pound could only be sustained upon such a body, on the *hypothesis* that it had been made with alcohol, and that if absolute inquiry were made upon each importation, the result would be that different shipments of the same product would pay different rates of duty, a result repugnant to both law and common sense.

Thus the Battle case was absolutely without force as affecting the question of duty on muriate of cocaine, which, as the certificate shows, can be made by but one process, viz: that involving the use of alcohol. The other reasons which influenced the courts in the Battle case we need not discuss, further than to comment, in passing, upon the suggestion of the circuit judge in that case, to the effect that since chloral hydrate was usually diluted or admixed before its employment, it was doubtful whether it was "in a strictly legal or dictionary sense" a medicinal preparation. This language shows that the remark was merely *obiter*, not a conclusion from any evidence in the record. In the state of the record as well as of the certificate in the present case, this remark can have no application, for the testimony here proves conclusively, and the circuit court of appeals has certified, that muriate of cocaine is a medicinal preparation in every sense of the word.

The case in re Hirzel was concerned with the duty on crude cocaine, an article as different from muriate of cocaine as sodium is from table salt. Cocaine is an alkaloid, the powerful essential principle of the coca leaf, unstable in potential strength and unfit for medicinal use. The importer protested against its classification as an alkaloid, under paragraph 76, contending that it was dutiable as a medicinal preparation, and this protest and contention the courts very properly overruled. In the circuit, the decision proceeded chiefly upon the following reasoning: alkaloids, which are provided for by name in paragraph

76, are a very narrow class of articles, none of which are complete medicinal preparations, but all of which have potential medicinal virtue and are the substances from which medicinal preparations are manufactured. Whether any such body could be properly described as a medicinal preparation was doubtful, but if the description was applicable to any alkaloid it was equally so to them all. Thus to hold that they were dutiable as medicinal preparations would deprive the word "alkaloid" in paragraph 76 of all force and effect,—a result repugnant to the principles of statutory construction.

In the circuit court of appeals, while this doctrine was not repudiated, the decision was affirmed upon the ground that crude cocaine, not being practically fit for medicinal use, is not properly a medicinal preparation at all, the court saying: "Its common use in its impure condition is for the manufacture of the pure or advanced forms in which cocaine becomes known as a medicinal article, and which may properly be called 'medicinal preparations'".

No more than the Battle case does this of Hirzel influence the issue now under discussion. Alkaloids, the narrow group which would have been left without operation by sustaining the contention of Hirzel, included cocaine but distinctly excludes muriate of cocaine. Salts, the term which includes muriate of cocaine, is an immensely wide one, and not one in a thousand of its members is in any sense medicinal. Crude cocaine was finally, and properly, held not to be a medicinal preparation at all. Muriate of cocaine is a type of those *pure or advanced forms* which the court in the Hirzel case referred to as products *which may properly be called medicinal preparations*. Thus in the Battle and in the Hirzel cases, two products which had no right to enter paragraph 74 at all, were excluded from classification under that paragraph. In neither of the cases, in the upper or the lower court, was any such doctrine asserted, or any such contention apparently made by counsel, as that upon a conflict between the

two paragraphs, 76 should have precedence. Up to that time, no such conception of the law seems to have entered the mind of any court, counsel or executive official.

No other decision has to our knowledge been rendered by the courts upon the relevant provisions of the act of 1890, except that in the Mallinckrodt case, which as already stated, we are here to reverse. But the Treasury officials apparently made a wrong application of the decisions we have discussed, for in March, 1893 (S. 13849), collectors were ordered to assess duty upon muriate of cocaine under paragraph 76, and such order was explained as being issued in consequence of the circuit court decision in the Hirzel case. A reading of S. 13849, which we have attached to our brief as appendix B, will show what an entire misconception of the Hirzel decision was involved in the position of the Treasury, as well as an entire misconstruction of the different paragraphs of the tariff law. Upon the change in practice which followed at the custom house, protests were at once lodged by importers, who felt aggrieved that a construction which had prevailed for four years under the law in force and for time out of mind under previous laws, should be suddenly overturned, not in pursuance of, but in conflict with, the decisions of the courts. These protests were sustained by the general appraisers as they came up for decision, until the spring of 1894, when their decision on Mallinckrodt's case was appealed to court by the Treasury, resulting in the reversal of the board, reported in 66 Fed. Rep., already cited. Thereafter, the general appraisers, not at all changed in their view, but feeling compelled to follow the rulings of the courts, (see S. 15114*) re-

* "In G. A. 886, the board found that it [muriate of cocaine] was a medicinal preparation in the preparation of which alcohol is used, and held that enumeration under paragraph 74 is more specific than the provision in paragraph 76 for alkaloids, salts, chemical compounds, etc. This view, which we still hold but no longer maintain, is, however, in conflict with several recent judicial decisions. And as we are under the necessity of following the opinions of appellate tribunals, our former rulings on the subject must be reversed."

versed their own attitude and decided the remaining protests against the importers at New York and elsewhere.

The decision in the Mallinckrodt case held that paragraph 76 provided more aptly for muriate of cocaine than paragraph 74. It is unsound both in reason and in law, and should be overruled in the present case. The entire opinion is permeated with errors, among which it will doubtless suffice to point out the following :

1. A complete confusion of *alkaloids* and *salts*, which the court appears to think are practically the same article or class of articles. The decision makes reference to "alkaloid salts", and purports to find, in the language employed in paragraph 76, a congressional intention to impose duty at 25 per cent "on all of a specific class of organic substances or compounds known as 'alkaloids' or 'alkaloid salts'". As congress has nowhere employed the term "alkaloid salts", and as such term is not known among chemists or merchants, it seems to us that this reasoning of the court is absolutely fallacious.

2. The dictum that the significance of the words in paragraph 76 is in the judgment of the court more precise than the phrase "medicinal preparations in the making of which alcohol is used".

It may be observed that the court reached this conclusion in view of the word "alkaloids", and then proceeded to apply it in favor of the hypothetical phrase "alkaloid salts". Observing that alkalies and alkaloids are named together in paragraph 76, and that, as shown by the certificate in the present case "salts are either alkaloidal or alkaline, produced by combination of either alkaloids or alkalies with acids", it is evident that no construction can be maintained in favor of alkaloidal salts (the only existing things

suggested by the imaginary phrase "alkaloid salts") which must not equally apply to "alkaline salts." And if both sorts are to be brought within the operation of the words "alkaloids" and "alkalies" the further provision for "salts" in the act is absolutely nugatory. Thus it is unwarrantable, both textually and logically, to apply in favor of any kind of *salts* the reasoning which might properly be applied to *alkalies* and *alkaloids*.

3. That because crude cocaine had been held dutiable at 25 per cent in the Hirzel case, it would be wrong to allow the completed medicinal salt of it to enter at a less rate of duty. To this we answer

(1) That the language of the law being clear and unambiguous, there is no room or warrant for construction, for this court has held that construction has no proper scope in laws whose meanings are clear.

Ruggles vs. People of Illinois, 108 U. S. 536
and see Rice *et al.* vs. U. S. 10 U. S. App 670
U. S. vs. Downing, 14 U. S. App 434-438

(2) That to adjust tariff laws to the supposed requirements of political economy, especially at the expense of violence to their language, is not construction but legislation.

Merritt vs. Welsh, 104 U. S. 694.

(3) That in the present instance, any attempt so to adjust the law would be hopeless. Surely one rule cannot be made for the alcoholic medicinal, cocaine muriate, on which 50 cents per pound happened,—upon the price in 1894,—to be less than 25 per cent, and another rule for the alcoholic medicinal, terpene hydrate, on which at the same time 25 per cent happened to be less than 50 cents per pound. On many, perhaps most, of the products within the operation of paragraph 74, 50 cents per pound was the higher rate. On some, indistinguishable in kind from the others, it

was lower. In the act next following (28 Stat. at L. 511) congress legislated so as to effect a discrimination in this regard, by providing, after re-enacting the language of paragraph 74 from the act of 1890, that no such preparation should pay less than 25 per cent. Surely this proviso of 1894 cannot legally be surcharged on the act of four years earlier by judicial interpretation. Within the act of 1890 itself there are the most diverse rates imposed on different medicinal preparations, such as (paragraph 22) iodoform $1.00 per pound; (paragraph 24) medicinal carbonate of magnesia three cents per pound; (paragraph 25) salts of morphia, 50 cents per ounce; (paragraph 35) aqueous extract of opium &c. 20% *ad valorem*. It would be an extensive task upon which a court would enter if it were to undertake to level out the rates which congress has seen fit to impose on different products of a like general character, or to adjust equitably those on differing sorts of goods, and we think it is fully established in the cases above cited, that it would be an illegitimate task as well. At the very time when the courts decided that the collector had been right in excluding crude cocaine from paragraph 74, he was, and for years had been, passing muriate of cocaine under that paragraph, recognizing it as an alcoholic medicinal preparation.

We submit that each one of these three propositions of the circuit court in the Mallinckrodt case is an error which alone would require the decision to be overruled. It is the only case which it is necessary for this court to call into question in order to decide the case now before it in harmony with our contentions. It controlled the action of the circuit court judge before whom the present case was argued. It was not rendered by a court whose rulings can in any degree control the action of this court; it was bad law and should be overturned.

Is it unreasonable to suppose that the circuit court of appeals which sent this certificate here, and which

demonstrated its clear view of the controlling facts in the case by the language of its certificate, sent it here because it was thought desirable that the inevitable decision in favor of paragraph 74, should, in view of the several decisions in different circuits, more or less in conflict with each other, be rendered by the Supreme Court of the United States?

The circuit court of appeals should be instructed that muriate of cocaine was [redacted] dutiable, under the act of 1890, under paragraph 74 of that act and not elsewhere therein.

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APPENDIX A.

Treasury rulings as to the force of provisions for medicinal preparations.

S 2078. January 23, 1875. "The Department * * concurs with you in the opinion that, as the article in question [adhesive plaster in rolls] is a preparation intended and used for medicinal purposes, it is dutiable as a medicinal preparation not otherwise provided for.

S 2603. January 17, 1896. "It appears, * * that * * quinoiline, or 'chinoidine', is a precipitated extract of Peruvian bark; * * used as a substitute for quinine * *, and that it enters largely into the composition of most of the popular remedies * * it is dutiable as a medicinal preparation not otherwise provided for."

S 2867. June 19, 1876. "It appears * * that the malt extract in question [Johann Hoff's] * * is recommended by competent authority as of special advantage in diseases of the chest and stomach * * but to be always used under the direction of a physician * * the merchandise being in fact a 'medicinal preparation or composition, recommended * * as a proprietary medicine' * *, it is not covered by decision of July 10, 1875 (SS 2338) * * is dutiable * *, under the provision in Schedule M for 'proprietary medicine' ".

S 3080, January 18, 1877. "It appears * * that the cigarettes in question are 'proprietary medicines * * * prepared according to some private formula, or secret art.' duty was properly exacted under the provision for 'proprietary medicines.' "

S 3395. October 20, 1877. "* * the article in question [Salicylate of Sodium] is used principally as a medicine * * it was therefore classified as subject to duty * *, under the provision in Schedule M, R. S. for 'medicinal preparations not otherwise provided for.' The Department is of opinion that such classification was correct".

S 3528. April 9, 1878. "You are informed that the Department regards the article [Braunscheid oil] as a proprietary medicine, dutiable."

S 4011. May 15, 1879. "It appears, * * that the article, [Sulphate of cinchonidia] although a chemical salt, is a well-known medicinal preparation, which is used as a substitute for * * sulphate of quinine, and * * that it is dutiable * * under the provisions in schedule M, (Heyl, 1332,) for 'medicinal preparations not otherwise provided for.'"

S 4117. July 29, 1879. * * the members of the board [U. S. Gen'l App.] are unanimously of the opinion that the bicarbonate of potash, * * is used almost exclusively as a medicinal preparation, and that it is almost invariably classified as such, * * * * in the opinion of the board, very little, if any, of such merchandise is imported and admitted * * now under any other than the above classification.

S 4161. August 26, 1879. A decision substantially identical with S. 4011.

"It appears that the article in question [Sulphate of cinchonidia] is one of the natural alkaloids of cinchona bark, and although a chemical salt, is used exclusively as a medical preparation, and was classified for duty under the provision in Schedule M. Revised Statutes, for 'Medicinal preparations not otherwise provided for.'"

S 4531. May 17, 1880. "In regard to the cotton cloth, the appraiser reports that it is known as 'anti-septic gauze' * * specially prepared with carbolic acid for surgical * * dressings * * The Department is of the opinion that the cloth was properly classified as a 'medicinal preparation' in accordance with the principle set forth in decision of September 27, 1866, or adhesive plasters."

S 4575. June 14, 1880. "With regard to the first mentioned article [Salts of tartar] the Department concurs with the appraiser at your port in the opinion that it should be classified as a medicinal preparation not otherwise provided for."

S 4693. November 4, 1880. "In the opinion of the Department, such articles [Robinson's corn-solvent pencils] come within the category of "proprietary medicines," which, by Schedule M, (Heyl, 1397,) are dutiable at the rate * *."

S 4701. November 16, 1880. "After due investigation * * and an inspection of a sample, it is ascertained that the article [Chian Turpentine] is an oleoresin, which is medicinally pure and which is used as a specific in cases of cancer, * * In the opinion of the Department the article is dutiable * * under the provision * * for 'medicinal preparations not otherwise provided for.'"

S 4809. March 28, 1881. "the article in question [Salicylate soude] is not the ordinary salicylate of soda, * * but is a proprietary medicine * * *"

S 4834. April 19, 1881. "It is understood * * that the said article [Johann Hoff's malt extract imported in casks] * * is identical with the 'Johann Hoff's malt-extract' * * held to be dutiable * * as a 'proprietary medicine' * *

the Department, * * decides that the said article, * * is dutiable * * as a 'proprietary medicine.' The ruling of * * (S 2338,) on 'malt-extract' in casks, was not intended to cover a proprietary medicinal article of this character, * *

In a recent case at Phila, the Department decided that the Johann Hoff's Malt-extract, imported in bottle not stamped and labelled, was dutiable as aforesaid."

S 4968. August 20, 1881. "It appears that it has been your practice to treat the last two [articles, Bishop's granular effervescent pepsin, bismuth, and strychnia, and Bishop's granular effervescent citrate of caffeine] as dutiable at 50 per cent. *ad valorem.*

Reports obtained from experts in the appraisers' office * *, satisfy the Department that the last two are dutiable * * under the provision * * for proprietary medicines, &c."

S 4987. August 26, 1881. "It is understood * * that the appeal only relates to catgut ligatures, which were classified for duty at the rate of 40 per cent ad valorem, * *, rubber inhalers, * * which were classified at a duty of 35 per cent ad valorem, * * carbollized, medicated, and styptic cottons, which were classified at a duty of 40 per cent, ad valorem, * *

In the opinion of the Department, all of the said articles are liable to duty at the rate of 40 per cent. ad valorem, * *, under the provision for 'medicinal preparations not otherwise provided for.'"

S 8503. October 26, 1887. "It appears that said importations consisted of * * Batley's 'Liquor Opii Sedativus' * * 'Herring's Extract Cannabis Ind.,' and * * Batley's 'Liquor Secali Cornuti.'

Upon an examination of the three samples * * the appraiser * * reports * * that Batley's 'Liquor Opii Sedativus' is treated * * as a proprietary medicine under * * (S 6684) and that the

other two articles * * are, in his opinion, dutiable at * * 25 per cent. ad valorem * * [under the provision for medicinal preparations not specially provided for] Your decision as to the liquid opium * * is hereby affirmed. * * As to the other two * * the Department concurs with the appraiser".

S 9217. January 26, 1889. "Under the Department's decisions * * (S. 7574,) * * (S 8494,) the salt in question [Carlsbad sprudel salt] was properly classified as a proprietary preparation."

S 9715. November 18, 1889. (S. 9217 modified) "After a careful inquiry into the nature of this article [Carlsbad sprudel salt] * * the Department finds that these salts are the natural salts from the sprudel springs at Carlsbad * * The Attorney-General, * * expresses the view that the salt, * * should be entitled to entry as a chemical salt * * In this view the Department concurs, it being of the opinion that a natural salt of this character cannot be considered as a preparation within the meaning of T. I. 99. * * * the Department's decision * * wherein said salts were held to be dutiable as a proprietary preparation, is modified, and said salts are hereby held to be dutiable * * as chemical salts not otherwise provided for. * * This decision must not, however, be applied to artificial Carlsbad salt, which, being a preparation within the meaning of T. I. 99, would be dutiable under that provision * *".

S 11194.—G. A. 553. May 4, 1891. "The merchandise in question is acetanalid, * * Duty was assessed on the article as a chemical compound. * * Acetanalid is known as a medicinal preparation. * * It should, therefore, be classified * * as a medicinal preparation."

S 11572—G. A. 747. July 13, 1891. "The merchandise consists of atropine sulphate and elaterium, which

were assessed for duty as medicinal preparations at 25 per cent., under paragraph 75 N. T. The appellant contends that the atropine sulphate is dutiable at 50 cents a pound, under paragraph 74, as a medicinal preparation in the preparation of which alcohol has been used * *

This importation is from Germany. According to formulas given by standard German authorities, alcohol is the solvent used in the preparation of atropine sulphate. Dr. Bernard Fisher, a celebrated German chemist, certifies that the use of any solvents other than alcohol in this preparation is objectionable. The claim of the importer that atropine sulphate is dutiable under paragraph 74 at 50 cents a pound is therefore sustained."

S. 11973—G. A. 886. September 24, 1891. "The merchandise consists of beberine sulphate, cocaine hydrochlorate, and hyoscamine sulphate, all * * assessed * * as chemical salts * * The appellants claim that the articles are dutiable * * as medicinal preparations * * From the three special reports of the appraiser * * it would appear that the claim * * is well founded In view of the reports * * the Collector stands willing to allow the claim * * But the Naval Officer dissents, for the reason that he is of the opinion that paragraph 75, for chemical compounds and salts, is a more specific enumeration than medicinal preparations mentioned in paragraph 74.

From expert testimony * * we find that the three articles in question are medicinal preparations * * We hold, * * that enumeration as a medicinal preparation is more specific than the provision for chemical salts * *"

S 14805—G. A. 2488. February 19, 1894. "The goods are "Brown's chlorodyne" and "Liqueur de Dr. Laville", which we find to be medicinal proprietary preparations containing alcohol.

While this finding is in accordance with the appraiser's return, he also reported that the articles were 'chemical compounds', and assessment of duty at 25 percent was made under the latter enumeration.

The board has invariably held, and is still of the opinion, that enumeration under paragraph 74 is more specific than under paragraph 76. We sustain the claim that the merchandise is dutiable * * * under paragraph 74, N. T.

This is not in conflict with G. A. 1531, for in that case it was held that crude cocaine is not a medicinal preparation."

APPENDIX B.

S 13849.

TREASURY DEPARTMENT, March 20, 1893.

GENTLEMEN: The Department is in receipt of your letter of the 16th instant in which, calling attention to Department's letter of the 7th instant, instructing the collector of customs at New York to disregard G. A. 886 and to classify muriate of cocaine under the provisions of paragraph 76 of the act of October 1, 1890, you state that muriate of cocaine is a refined article and a medicinal preparation, and is not an alkaloid, while cocaine (whether crude or refined) is an alkaloid, and you therefore request that the Department's instructions above referred to be reconsidered and the collector of customs at New York authorized to admit muriate of cocaine as a medicinal preparation under paragraph 74 of the act of October 1, 1890, in harmony with the decision of the Board of General Appraisers (G. A. 886).

You state that muriate of cocaine is prepared by dissolving crude cocaine (an alkaloid) in alcohol, to which solution hydrochloric acid is added; that the acid combines chemically with the alkaloid, and forms cocaine hydrochlorate, a new product, which is then purified by repeated recrystallization from alcohol.

In reply, I have to inform you that, inasmuch as it appears from your own statement that muriate of cocaine is a salt of an alkaloid, the Department adheres to the opinion that this article is more specifically provided for in paragragh 76 of the act of October 1, 1890, which includes salts of alkalies, alkaloids, etc., than in paragraph 74, cited by you, which provides in general terms for medicinal prepara-

tions, such view being in harmony with the recent decision of the United States circuit court for the southern district of New York in the case of Hirzel, Feltman & Co., wherein it is held that the provision in paragraph 76 for alkaloids is more specific than that in paragraph 74 for medicinal preparations.

Your request for a reconsideration is therefore denied.

Respectfully yours,

(2545*g*.) O. L. SPAULDING,
Acting Secretary.